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No. 477

In the Supreme Court of the United States

OCTOBER TERM, 1930

RICHARD HUSTY AND CHARLES LAUREL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

No opinion was rendered by either the District Court or the Circuit Court of Appeals.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 28, 1930. (R. 68.) The petition for certiorari was filed September 26, 1930. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the search and arrest were upon probable cause.

2. Whether the indictment adequately stated a criminal offense.

3. Whether the sentences imposed were warranted by the convictions.

STATUTE INVOLVED

The Act of March 2, 1929, c. 473, 45 Stat. 1446 (U. S. C. Sup. III, Title 27, Secs. 91, 92), commonly known as the Jones Act, provides:

> That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.
>
> SEC. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act.

STATEMENT

On March 5, 1930, the petitioners were indicted in the District Court on two counts respectively charging them with transportation and possession of whisky in violation of the National Prohibition Act. The second count set forth prior convictions of the petitioner Husty for unlawful possession of intoxicating liquor on November 9, 1922, and on April 3, 1928. (R. 1–3.) Upon being arraigned both petitioners stood mute, whereupon a plea of not guilty was entered as to each. (R. 3.) A motion was made to suppress the evidence, and a demurrer and a motion to quash were filed to the indictment, all of which were overruled. (R. 4–10.) A motion was made by petifioner Husty for a separate trial, which was also denied. (R. 9.) After a trial both petitioners were found guilty as charged. (R. 10–11.) Motions for a new trial and for judgment *non obstante veredicto* having been overruled, the petitioner Husty was sentenced to five years in the penitentiary and to pay a fine of $3,000, and Laurel was sentenced to one year and six months in the reformatory. (R. 11–15.) Upon appeal the convictions were affirmed by the Circuit Court of Appeals. (R. 68.)

The evidence tended to establish the following facts:

On December 10, 1929, one Scully, a Deputy Prohibition Administrator, received detailed information that the petitioner Husty had two loads of

liquor parked in a Graham-Paige coupe and a Studebaker sedan, near the vicinity of Jefferson and Pleasant Streets, in Grand Rapids, Michigan. (R. 25, 26.) Scully had known Husty since 1922 and knew that he was a "bootlegger," having arrested him in 1922 and again in 1928 for violation of the National Prohibition Act, both of which arrests resulted in convictions. (R. 23–24, 54.) Acting on the information which he had received and which came from a person he had known for eight years and who had previously given him reliable information, Scully, with Prohibition Agent Harring, went to the place described about 8 o'clock that night and found the Graham-Paige. Husty was not there at this time but appeared shortly afterward with the petitioner Laurel and a third man, all three of whom got into the Graham-Paige. Husty started the car and had moved a few feet when Scully, who had his car parked near by, pulled up in front of the coupe and stopped it. Laurel and the third man ran. (R. 25–26, 52.) Scully then looked into the coupe and saw whisky bottles containing a liquid. He also saw bags which appeared to be filled with bottles. (R. 32, 52.) Further search disclosed eighteen cases of whisky. (R. 26, 52.)

At the time of arrest Husty had upon his person $960 in cash and two checks. Laurel, when arrested, stated that he had come over that day from Detroit with Husty in the Graham-Paige coupe, that he had not known Husty before that time and did not know that the car contained liquor. (R. 52–53.)

Agent Harring's testimony concerning the arrest and seizure was substantially the same as Scully's. (R. 53–54.)

ARGUMENT

I

THE ARREST AND SEARCH WERE UPON PROBABLE CAUSE

The petitioners moved to suppress the evidence secured from the search of the car in which they were arrested upon the ground that their arrest and the search of the car, made without warrants, were without probable cause.

Scully had known petitioner Husty as a bootlegger since 1922, having arrested him on two prior occasions for unlawful possession of intoxicating liquor, both of which arrests resulted in convictions. The information that Scully acted on came from a man whom he had known for eight years and whose information he believed he could rely on with prudence. Scully had received "tips" before from this same person and had always found them reliable. (R. 26.) This, together with his personal knowledge that Husty was a "bootlegger," and the fact that the car was found at the place described, was sufficient, we submit, to warrant Scully in believing that intoxicating liquor was being unlawfully transported in the automobile which he stopped and searched. *Carroll* v. *United States*, 267 U. S. 132. See also *Kudy and Langtry* v. *United States*, No. 392, October Term, 1930, certiorari denied, October 20, 1930.

It is contended by the petitioners that if Scully deemed the source of his information reliable he had ample time in which to have secured the proper warrants. But the officer had no means of knowing how soon the car might be moved. In the *Carroll case, supra,* it was pointed out that, if it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought, the officer may proceed without a warrant.

II

THE INDICTMENT ADEQUATELY CHARGED A CRIMINAL OFFENSE

The petitioners contend that the indictment does not charge the crimes alleged with sufficient particularity. The indictment alleges the unlawful transportation in a Graham-Paige coupe and the unlawful possession of intoxicating liquor fit for use for beverage purposes, to-wit, whisky, on December 10, 1929, in Grand Rapids, Kent County, Michigan, within the jurisdiction of the court. (R. 1–2.) It is submitted that this indictment contained all the substantial elements of the offenses averred and duly informed the petitioners of the charges against them. There is nothing in the record indicating that they were taken by surprise or that they were in any doubt as to the offenses with which they were charged. While the indictment did not expressly mention the Jones Act, it charged the

commission of the alleged offenses subsequent to March 2, 1929, the effective date of the Act. If the petitioners had desired any further information as to the time and place of the alleged offenses it could have been supplied by a bill of particulars. *Durland* v. *United States*, 161 U. S. 306, 315. No motion for a bill of particulars was made.

In *Skelley* v. *United States*, 37 F. (2d) 503 (C. C. A. 10th) cited by the petitioners in support of their contention that the indictment should have stated with more particularity the *place* of the commission of the offenses charged the objection was raised by special demurrer. In the instant case the demurrer and motion to quash were general in form, and no prejudice being shown the objection is not available. R. S. § 1025 (U. S. C., Title 18, Sec. 556). *Ledbetter* v. *United States*, 170 U. S. 606, 613; *Myers* v. *United States*, 15 F. (2d) 977 (C. C. A. 8th); *Leonard* v. *United States*, 18 F. (2d) 208 (C. C. A. 6th).

The petitioners further contend that the indictment was insufficient because it did not advise them whether they were charged with a misdemeanor or a felony, or whether they were charged as casual or slight offenders or as habitual or commercial violators. This complaint is apparently based on the theory that the Jones Act created new offenses, for without that as a premise there is nothing upon which such argument can rest. But the Jones Act created no new offenses. Its obvious purpose was to increase the maximum penalties which might be

imposed for certain violations of the National Prohibition Act. The proviso to the Jones Act defines no new crime, but merely cautions the court to exercise a judicial discretion in the imposition of sentences. *Ross* v. *United States*, 37 F. (2d) 557 (C. C. A. 4th), certiorari denied, 281 U. S. 767; *United States* v. *Kent*, 36 F. (2d) 401 (S. D. Ill.). Contentions similar to those relied on by petitioners were made in *McElvogue* v. *United States*, No. 167, October Term, 1930, in which this Court denied certiorari on October 13, 1930.

III

THERE IS NO GROUND UPON WHICH THIS COURT SHOULD REVIEW THE SENTENCES

The Jones Act gives the trial court *power* to impose sentence of imprisonment not to exceed five years and fine not to exceed $10,000 for any violation of the National Prohibition Act. Here neither sentence exceeded these limits. Obviously, the proviso that Congress intended the court to use discrimination in imposing sentence was not intended as a limitation upon the power of the court, and if the sentence was excessive the remedy is with the Executive. Certainly the sentence authorized by statute can not be reviewed on a bill of exceptions. This precise point was raised in *Ross, Petitioner*, v. *United States*, No. 886, October Term, 1929, in which petition for certiorari was denied by this Court on June 2, 1929 (281 U. S. 767).

The validity of the sentences is further questioned on the ground that they contravene the constitutional provision relating to *ex post facto* laws. The contention of the petitioners apparently is that in applying the proviso of the Jones Act requiring the trial court in imposing sentence to discriminate between "casual or slight violations" and "habitual sales" or "attempts to commercialize violations of the law," the trial court may not consider any violations of the National Prohibition Act occurring prior to the enactment of the Jones law. Such contention is clearly not tenable. *McDonald* v. *Massachusetts*, 180 U. S. 311; *Graham* v. *State of West Virginia*, 224 U. S. 616.

CONCLUSION

No substantial ground is presented for the allowance by this Court of a writ of certiorari, and the petition should therefore be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
MAHLON D. KIEFER,
F. CADMUS DAMRELL,
PAUL D. MILLER,
Attorneys.

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